STATE OF FLORIDA

PUBLIC EMPLOYEES RELATIONS COMMISSION

THE ORANGE COUNTY CLASSROOM TEACHERS ASSOCIATION, INC.,

Charging Party,

v.

SCHOOL DISTRICT OF ORANGE COUNTY, FLORIDA,

Respondent.
_____/

Case No. CA-2018-050

Order No.: 21U-285
Date Issued: September 24, 2021

FINAL ORDER

On November 20, 2018, The Orange County Classroom Teachers Association, Inc. (Union), filed an unfair labor practice charge against the School District of Orange County, Florida (District), alleging that the District violated section 447.501(1)(a) and (c), Florida Statutes (2021),[1] by unilaterally imposing teacher evaluation procedures that changed terms and conditions of employment and refusing to bargain. The Commission's General Counsel found the charge to be sufficient, and a hearing officer was appointed.

The Commission-appointed hearing officer conducted a three-day evidentiary hearing on January 15, October 27, and October 28, 2020. On January 20, 2021, the hearing officer issued an order finding that the charge was untimely filed and recommending that the Commission dismiss it. The hearing officer also concluded that

[1] Unless otherwise indicated, all citations are to the 2021 Florida Statutes.

the District was entitled to an award of attorney's fees and costs.[2] The Union filed a copy of the hearing transcript[3] and, on February 2, filed six amended exceptions. The District did not file exceptions, but filed a response to the Union's exceptions.

On April 20, we issued an order granting the Union's exceptions one, two, and three on the issue of timeliness, because we could not conclude based on the hearing officer's findings of fact that the charge was untimely. We remanded the case to the hearing officer to make supplemental findings of fact, analysis, and recommendations.

On May 27, the hearing officer issued his supplemental recommended order, finding that the charge was timely filed. He concluded that the District violated 447.501(1)(a) and (c), Florida Statutes, by refusing to bargain collectively – specifically, by failing to respond to a demand for impact bargaining by the Union – and by unilaterally imposing a teacher evaluation system. The hearing officer recommended that the Union be awarded fees for the failure to bargain portion of the charge, but not the unilateral change portion.[4]

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[2] References and citations to the hearing officer's findings of fact in the initial recommended order are denoted as "Finding of Fact" or "FOF" followed by the appropriate paragraph number(s).

[3] Citations to the transcript are denoted as "Day 1 T." for the first day of the hearing, "Day 2 T." for the second day, and "Day 3 T." for the third day, followed by the appropriate page number(s). Citations to the Union and District's exhibits are denoted as "CP Ex." or "R Ex.," respectively, followed by the appropriate exhibit number(s).

[4] Citations to the hearing officer's supplemental recommended order are denoted as "SRO" followed by the appropriate page number(s). References and citations to findings of fact contained in the supplemental recommended order are denoted as "Supplemental Finding of Fact" or "SFOF" followed by the appropriate paragraph number(s). Citations to the District's exceptions to the supplemental recommended order are denoted as "Exceptions at" followed by the appropriate page number(s).

On June 10, the District filed forty-eight exceptions to the supplemental recommended order and requested oral argument. The Union did not file any exceptions to the supplemental recommended order but filed a response to the District's exceptions and objected to oral argument.[5] We granted oral argument, which was held on August 19.

To provide context for the District's exceptions, we begin with an overview of the facts. The District is a public employer within the meaning of section 447.203(2), Florida Statutes, and the Union is an employee organization within the meaning of section 447.203(11), Florida Statutes. The Union represents a bargaining unit of instructional personnel employed by the District. *See* Certification No. 27.

In 2011, the Florida Legislature passed Senate Bill 736, which mandated teacher evaluations be tied to performance pay. Teachers employed by the District are evaluated annually. An evaluation places a teacher at one of four different rating levels: "highly effective," "effective," "needs improvement/developing," or "unsatisfactory." § 1012.34(2)(e), Fla. Stat. Teachers who receive "highly effective" evaluation ratings receive more pay than teachers rated as "effective" or lower. In turn, teachers who receive ratings of "effective" receive more pay than teachers who receive the rating "needs improvement/developing."

[5] Because the Union did not renew its remaining exceptions to the January 20 recommended order, we consider them withdrawn in accordance with our April 20 remand order. *See* Remand Order at 7 ("[W]e do not rule on the Union's remaining exceptions at this time. The Union may renew these exceptions with specificity at the time it files its exceptions to the supplemental recommended order, if warranted. Any specific exceptions to the recommended order that the Union does not renew shall be considered withdrawn.").

After the law was enacted, the parties changed teacher salary schedules and how teachers were evaluated. The parties' Collaborative Bargaining Leadership Team (CBLT) decided to utilize the "Marzano Model" to evaluate teachers. Before deciding upon the Marzano Model, the parties bargained over which system to use. They agreed to use Marzano over competing systems offered by private vendors, which are used in other Florida counties.

The Marzano Model is organized by using domains, elements, protocols, and scales. There are four domains, which address the following: classroom strategies and behaviors; lesson planning and preparation; reflecting on teaching; and collegiality and professionalism. Teachers are evaluated based on the different elements, known as instructional strategies, within each domain. Teachers are scored in the first domain through informal or coaching evaluations. They are scored on the second, third, and fourth domains through a formal evaluation. Elements are research-based best practices that teachers can employ to cause a desired effect or an outcome that students can demonstrate. Every element has protocols, or criteria, which provide a focus statement that includes the teacher actions and the desired student outcomes. Protocols include a developmental scale, which describes a progression through levels of proficiency with the use of the strategy.

The domains, elements, protocols, and scales are crucial, intertwined criteria and components of the evaluation. They cannot be separated from the evaluation and considered independently, due to their fundamental and intertwined positions in the evaluations. The scales, which are part of the protocols, determine the score that a

teacher receives, which determines the teacher's rating and ultimately the teacher's salary. The elements affect the workload because teachers engage in substantial preparation to prove to their observers that they are meeting the required elements. The protocols for each element inform the teacher about expectations for their lessons. Requiring that a teacher provide evidence or data about the teacher's lesson plan impacts the teacher's workload. The more detail that a protocol requires, the more the teacher's workload increases because the teacher must modify individual lessons to provide what the protocol requires. Requiring a teacher to provide evidence to demonstrate to an administrator that the teacher is meeting a protocol increases the teacher's workload, regardless of whether the teacher receives a rating of effective or highly effective.

The parties bargained over the criteria, components, and the impacts of the Marzano Model. They agreed to implement only a few of the Marzano elements for the first year (2011-2012) and then bargained over which elements to use. The parties bargained over how many "eggs in the basket" a teacher needed to achieve an evaluated rating of effective or highly effective. Although the parties did not alter the definitions in the Marzano framework, they also bargained over how to total the ratings to arrive at an overall evaluation. The parties reached a tentative agreement (TA) on teacher evaluations for the 2011-2012 school year. The TA stated that teachers would be placed in one of four categories for purposes of evaluation, depending mostly on their level of experience. The TA described the provisions and procedures for the informal and formal observations upon which the teachers would be evaluated and how teachers would be

scored. The TA charged the Evaluation Committee of the CBLT with recommending changes to the Evaluation Manual to the CBLT. The CBLT bargained and signed off on an Instructional Personnel Evaluation System Procedures Manual for 2011-2012. The document was filed with the state and used as a procedures manual for teachers.

The Florida Department of Education adopted the Florida Educator Accomplished Practices (FEAP), which are designed to establish Florida's core standards for effective educators. *See* Fla. Admin. Code R. 6A-5.065. There are three "foundational principles" that must be applied through six "Educator Accomplished Practices," which form the foundation of the state's teacher preparation programs, educator certification requirements, and school district instructional personnel systems. The FEAPs do not establish exactly how a teacher must follow an accomplished practice or how a teacher must demonstrate to an administrator that a FEAP is being followed. School districts are required to embed the FEAPs into their systems, but not necessarily to incorporate them verbatim in their evaluation procedures. *See* § 1012.34(3)(a)2., Fla. Stat.

The parties also bargained over an Instructional Personnel Evaluation System Procedures Manual for the 2012-2013 school year. The appendix of the manual contains a Learning Map with four domains and elements under each domain. The parties continued to bargain over evaluations between 2012 and 2017. Due to the parties' agreement on the Marzano Model and a procedures manual, the parties did not bargain for the next few years over the model and its elements, protocols, and scales. However, the parties did address other evaluation issues. On September 7, 2012, the parties discussed issues such as the value-added model required by the state and what

percentage of a teacher's evaluation would be based upon student test data. In December 2012, and later on May 23, 2013, they bargained over changes to Article X of the parties' collective bargaining agreement (CBA), regarding teacher evaluations. On February 8, 2013, they discussed the parameters of teacher appeals of evaluations. In September 2013, the District declared an impasse over teacher evaluations and several other issues. The Union had made proposals on various matters regarding teacher evaluations. The issues at impasse were addressed by a Special Magistrate. In 2014, Learning Science International (LSI) updated the Marzano Model.

On September 28, 2016, the parties signed an agreement concerning Article X of the CBA and the evaluations manual, with the changes chiefly addressing the procedures for observing teachers and how ratings should be scored. On October 17, 2016, the CBLT executed a Memorandum of Understanding (MOU) regarding "Student Learning Growth and Ratings Ranges to Calculate Final Summative Evaluation Score.'" The MOU specified how ratings for teachers of highly effective, effective, needs improvement, and unsatisfactory would be demonstrated. On March 15, 2017, the CBLT reached a TA on three proposals on duty days for certain teachers, the number of informal and formal observations for evaluations for each category of teacher, and the aggregation of scores to produce an overall student learning growth score of effective.

On May 3, 2017, Union President Wendy Doromal, District Director of Evaluation Systems Stephanie Wyka, and District Superintendent Barbara Jenkins attended a meeting of the Florida Association of District School Superintendents (FADSS). At that

meeting, a presentation was given addressing part of the Marzano Focused Evaluation System (Focused Marzano Model), which is different from the Marzano Model. The Focused Marzano Model reduced the number of elements from the original Marzano Model and was intended to simplify the system and reduce workload for teachers and administrators.

Afterwards, the Union and the District had several meetings in which they discussed all aspects of the Marzano system, including whether to use the Focused Marzano Model, another school district's system, or a hybrid model. During these meetings the parties discussed what worked and did not work, as well as what needed to be changed because the Marzano Model had caused an increase in teachers' workloads and unnecessary work for teachers.

On June 21, 2017, the District and the Union engaged in a collective bargaining session. The minutes for the session referenced the FADSS meeting and stated, "In a subsequent follow up meeting with Dr. Jenkins, we all determined that we would like to build a bridge for 2017-2018 towards a more condensed evaluation tool." At the session, the parties signed a TA (June 2017 TA) that contained a Learning Map. The TA states: "This condensed Learning Map will be used during the 2017-2018 school year, as [the District] begins to transition to the *Marzano Focused Teacher Evaluation Model*. This streamlined, targeted resource serves as a way to bridge the 2014 Marzano Teacher Evaluation Model to the Focused Teacher Evaluation Model."

On June 27, 2017, the CBLT met to discuss moving from a "conjunctive scoring model" to a "rounded average scoring model." According to the minutes, the parties "have agreed to condense the Evaluation Learning Map for the 2017-2018 school year in anticipation of restructuring the Learning Map for future years." The evaluation committee met several more times to bargain over the evaluation system and stream-lining elements. On July 12, 2017, the evaluation subcommittee held a meeting to discuss protocols, focus statements, desired effects, teacher evidence, and reduction of elements.

On July 18, 2017, the CBLT met for an "Evaluation Article Language Clean Up." They discussed revising Article X as to observations dates and additional observations; the sequence for scoring observations; referencing elements in the contract by name instead of number; and identifying the party to provide orientation for deliberate practice. They also agreed to incorporate in the Evaluation Manual the changes to the teachers' learning map and contract language. The CBLT met on September 28, 2017, to discuss measuring the student learning growth component of evaluations. The CBLT met again on November 17, 2017. The minutes from that meeting state that the "Evaluation Committee has agreed to work towards streamlining the evaluation system. Our first meeting on this topic will be January 17, an all day meeting at CTA."

On January 17, 2018, the evaluation committee met, with discussion topics including a "Student Learning Growth" proposal to amend Article X and "Making Meaning of Evaluation – Collaborative Discussion Protocol." The members reviewed a chart of the

"observation process," "streamlining elements," and "deliberate practice" to discuss what was working, what was not working, and possible solutions. The discussion included the streamlining of elements and developmental scales.

As of May 2018, the Union and the District had not met for several months. The Union wanted to resume further discussions on evaluations. At a meeting on May 18, the Union proposed an evaluation system based upon the Polk County system, which it believed was in conformance with the FEAPs. The Union's proposal kept some of the Marzano Model structure and used FEAP guidelines as well as best practice indicators for protocols. The minutes indicate the District told the Union that it could not negotiate the model itself, only the impacts of the model.

On May 23, 2018, the Union and the District had an evaluation committee meeting during which the District informed the Union of its new evaluation system for the 2018-2019 school year (2018 Evaluation System). The Union asked who created the system and noted that it differed from the Focused Marzano Model. The District provided the Union with a list of names of who created the system. The District stated it had a management right to impose the 2018 Evaluation System and that it would take effect the upcoming school year. The Union disagreed with the District's claim that it had a management right to implement whatever system it chose.

The 2018 Evaluation System contained two elements that were not in the Marzano Models. The first was "Applying Literacy and Communication Strategies," which the Union concluded was a means to compel teachers to participate in a District Professional

Learning Communities (DPLC) initiative.[6] This element in the 2018 Evaluation System could continue the significant workload problems created by the DPLC initiative. For their evaluations, teachers would have to spend time demonstrating to administrators that they complied with the element. The second element was "Planning for the Achievement of All Students Using Data," which the Union opined would place even more demands on teachers "who are already overwhelmed with the burdensome workload and do not have enough planning time to complete mandated tasks within the 7.5 hour workday."

On May 25, 2018, the Union sent the District a demand letter to impact bargain. The Union complained that the District was making unilateral changes regarding developmental scales, planning protocols, professional responsibilities, and conditions of learning. The Union asserted that the District's changes would have an immediate and substantial impact on pay, workload, and training. The Union objected to initiating the system in the fall without adequate time to train teachers, which could result in lower evaluations, affecting their pay under the District's merit pay system.

On May 29, 2018, the Union filed a grievance, alleging violations of Article I, Recognition, and Article XXI, Management Rights. In its response, the District stated that

[6] DPLC was a method by which the District sought to instruct students in literacy strategies and close reading techniques. It became the subject of a dispute between the parties, which resulted in a different case before the Commission. *See Orange County Classroom Teachers Association, Inc. v. School District of Orange County, Florida*, 46 FPER ¶ 58 (2019) (resolving unfair labor practice charge alleging that the District repudiated a settlement agreement pertaining to DPLC), *per curiam aff'd*, 292 So. 3d 1190 (Fla. 5th DCA 2020).

establishing the criteria by which a teacher's proficiency is to be measured is a management right. The District also stated that since it had committed to not implement the Focused Marzano Model in 2018-2019, there was no unilateral change to the evaluation system and, therefore, the Union's grievance was moot.

The District did not respond to the Union's May 25 demand to impact bargain. Instead, the District continued to move forward with implementing portions of the evaluation system. In addition, the District ceased bargaining with the Union over evaluation procedures. During this period, the District notified teachers that it had met with the Union to discuss the evaluation process, during which it gathered input from the Union. The District stated that it had selected a different evaluation model. On July 24, 2018, the parties ratified a CBA that incorporated a procedures manual that included the Learning Map from the June 2017 TA.

The District continued to implement portions of its 2018 Evaluation System, such as data production and literacy strategies, going beyond the June 2017 TA and significantly increasing teacher workload. The District continued to require teachers to comply with "close reading" and "text dependent questions," which are parts of the element called "Applying Literacy and Communication Strategies" from the 2018 Evaluation System. In order to receive a good evaluation, teachers were told to comply with the District's new initiative. Observations for some teachers pointed out that they were not fully meeting the District's initiatives, which were portions of the new evaluation plan.

The District also compelled teachers to attend regular data meetings, which required them to compile reports, organize data, and produce evidence data at greater levels than in the past. In some situations, the requirements for data collection quadrupled. Preparation for a data meeting could take a teacher several hours per week. After the meetings, teachers had the added work of incorporating various requirements into their lessons and curriculum, which placed pressure on daily planning time and forced teachers to take an increasing amount of work home. The requirement to attend data meetings and other data requirements affected teacher evaluations. Although the data requirements did not prevent teachers from being rated as effective or highly effective on their evaluations, they were required to work much harder to receive those ratings.

There are numerous observations and evaluations for 2018 and 2019 that show the District did not rely on portions of its 2018 Evaluation System. On December 13, 2018, Leigh Ann Blackmore, Director of Labor Relations for the District, wrote Doromal to state that the District would not implement the Focused Marzano Model "at this time." Blackmore also asked Doromal to withdraw this unfair labor practice charge.

As we resolve the District's exceptions, we bear the following standards in mind. It is axiomatic that the Commission may not disturb any of the hearing officer's factual findings unless we first determine from a review of the entire record, including the transcript, that the challenged findings are not supported by competent, substantial evidence. § 120.57(1)(*l*), Fla. Stat.; *F.U.S.A.*, *FTP-NEA v. Hillsborough Community College*, 440 So. 2d 593 (Fla. 1st DCA 1983). It is the hearing officer's function "to

consider all evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact." *Boyd v. Department of Revenue*, 682 So. 2d 1117, 1118 (Fla. 4th DCA 1996). When the evidence presented at an administrative hearing supports two inconsistent versions of events, it is the hearing officer's role to decide between them. *International Union of Police Associations, Local 6090 v. City of Groveland*, 41 FPER ¶ 350 (2015). We may not reject the hearing officer's finding of fact "unless there is no competent, substantial evidence from which the finding could reasonably be inferred," and we are not "authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit [a] desired ultimate conclusion." *Heifetz v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

In contrast, we may substitute our conclusions of law for those of the hearing officer where we find our resolution of those issues is as reasonable or more reasonable than that of the hearing officer. *See* § 120.57(1)(*l*), Fla. Stat.; *see, e.g.*, *Broward Teachers Union, Local 1975, FEA, AFT, NEA, AFL-CIO v. School District of Broward County, Florida*, 45 FPER ¶ 141 (2018).

Turning to the District's exceptions, we first address the exceptions to the hearing officer's supplemental findings of fact. Where possible, we group our discussion of the exceptions, or portions of exceptions, together. Then, we address the exceptions to the hearing officer's analysis and conclusions of law.

Exceptions to Findings of Fact

Regarding Matters not in the Charge

In exceptions one through thirteen, sixteen, and twenty-four, the District takes issue with Supplemental Findings of Fact 1 through 5, 12 through 14, 16 through 20, 23 through 26, and 41, contending that the hearing officer should not have considered facts about the parties' bargaining history prior to 2018 as they are outside the scope of the charge.[7] In so doing, the District relies on two Commission cases.

With respect to the first case, *Apopka Professional Firefighters Association, IAFF, Local 4277 v. City of Apopka*, 35 FPER ¶ 107 (2009), the District quotes a portion of the hearing officer's recommended order in that case to argue that the hearing officer here was not permitted to address matters not contained in the charge. In the portion of the case quoted by the District, the hearing officer stated that she was not required to address the argument and facts because they were not contained in the charge. However, the District omits the crucial sentence immediately following that quoted portion in which the hearing officer stated that she would nevertheless consider the argument and facts so that all issues are resolved.

The second case does not stand for the proposition asserted by District either. In *Dade County, Florida School District Employees, Local 1184 of the American Federation of State, County and Municipal Employees, AFL-CIO v. School District of Miami-Dade*

[7] We note that although the District excepts to Supplemental Finding of Fact 4, in part, on the basis that "negotiations from 2011 were not alleged in the Charge," *see* Exceptions at 7, this finding of fact does not pertain to negotiations from 2011.

County, Florida, 34 FPER ¶ 256 (2008), we stated that the Commission did not have jurisdiction to consider allegations of unfair labor practices not in the charge. There, the charge included two unilateral change allegations. Thus, we could not consider the separate allegation of failure to bargain in good faith over a two-year period because it was not contained in the charge.

Here, the findings of fact regarding the parties' bargaining history prior to May 2018 are not included to establish a separate unfair labor practice allegation. Rather, they are factual findings that provide background to the allegations contained in the charge. Accordingly, exception sixteen[8] and those portions of exceptions one through thirteen and twenty-four are denied.

In exception thirty-three, the District challenges Supplemental Finding of Fact 64 on the basis that it should be excluded under *Dade County* and *City of Apopka*, as the referenced event took place after the charge was filed. As explained above, we reject the District's reliance on these cases for the proposition it propounds. Moreover, this finding of fact pertains to whether the District implemented the new evaluation system, an argument that was actually raised by the District. This portion of exception thirty-three is denied.

Relevancy Exceptions

Next, the District excepts to various factual findings of the basis of relevancy in exceptions one through three (SFOFs 1-3), exception six (SFOF 12), exception seven

[8] The findings of fact that are the subject of exception sixteen (SFOFs 23-26) are supported by competent, substantial evidence. (CP Exs. 48-49, 51-52, 56.)

(SFOF 13), exception twenty-six (SFOF 46), and exception forty-one (SFOFs 72-73). Relevancy is not a basis for granting an exception to a finding of fact. *See School District of Orange County*, 46 FPER ¶ 58. Accordingly, exceptions twenty-six,[9] the remainder of exceptions one and two,[10] and the related portions of exceptions three, six, seven, and forty-one are denied.

Regarding the Significance of Findings of Fact

In the remainder of exceptions nine, ten, twelve, thirteen,[11] twenty-four, and forty-one and in exceptions twenty-one and thirty, the District challenges Supplemental Findings of Fact 16-17, 19-20, 36, 41, 50-56, and 72-73. The District raises various arguments regarding the significance or legal effect of these findings of fact, neither of which is a basis for rejecting them as they are supported by competent, substantial evidence. (Day 1 T. 22-25, 252-56, 265, 267, 274-75, 278-81, 304-09; Day 2 T. 29, 57-58; Day 3 T. 327, 332-34; CP Exs. 7, 24, 28 at pp. 7-8, 37, 75 at p. 7; R Ex. 3 at p. 3.) Moreover, in many of these exceptions, the District asks the Commission to reweigh the evidence and draw different inferences from the hearing officer, which we may not do.

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[9] We correct a typographical error in the finding of fact that is the subject of exception twenty-six (SFOF 46) to reflect that the unfair labor practice in that case was filed on November 28, 2018, not November 18, 2018. With this correction, this finding is supported by competent, substantial evidence. (Day 1 T. 169-70; CP Ex. 61; *School District of Orange County*, 46 FPER ¶ 58).

[10] The findings of fact that are the subject of exceptions one and two (SFOFs 1-2) are supported by competent, substantial evidence. (Day 1 T. 94-96.)

[11] In exceptions twelve and thirteen, the District suggests that the hearing officer, in Supplemental Findings of Fact 19 and 20, concluded that the issue of increased workload had to be bargained. The District contends that this is a legal conclusion that conflicts with case law. Because the District's argument misrepresents those findings of fact, we reject it.

Heifetz, 475 So. 2d at 1281. Accordingly, we deny exceptions twenty-one and thirty and the remainder of exceptions nine, ten, twelve, thirteen, twenty-four, and forty-one.

Remainder of Exception Three

In exception three, the District takes issue with Supplemental Finding of Fact 3 regarding evaluations affecting teacher pay and impacting workload during the period of 1999 through 2006. As part of this exception, the District points to the 2011 bill analysis for Senate Bill 736, which generally states that "most individuals are paid on a 'steps and lanes' approach." (R Ex. 7.) This bill analysis does not contradict the hearing officer's finding of fact. The District also cites two other exhibits – the appendix to a tentative agreement that pertains to teacher salaries (CP Ex. 35 App. A) and a portion of a special magistrate report (CP Ex. 49 at p. 38). None of these documents address the time period of 1999 to 2006 referenced in this finding of fact.

The District also raises a "best evidence" objection to Supplemental Finding of Fact 3. *See* § 90.952, Fla. Stat. ("Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph."). However, the hearing officer did not make findings regarding the content of the CBAs or other documents during the time period of 1999-2006. Moreover, this finding of fact is supported by competent, substantial evidence. (Day 1 T. 94-97.) Accordingly, the remainder of exception three is denied.

Remainder of Exception Four

In exception four, the District challenges Supplemental Finding of Fact 4, in which the hearing officer found that the FEAPs are general principles and do not establish

exactly how a teacher must follow an accomplished practice or demonstrate to an administrator that a FEAP was being followed. The hearing officer's finding of fact is supported by competent, substantial evidence in the record and is consistent with the language of the rule and the statute cited in the finding of fact. (Day 2 T. 25-26, 32-36, 82-83; § 1012.34(3)(a)2., Fla. Stat.; Fla. Admin. Code R. 6A-5.065.) The District mischaracterizes the hearing officer's finding as being that the "FEAPs are suggestions and not requirements for evaluations." Nothing in the hearing officer's finding of fact suggests this. Accordingly, the remainder of exception four is denied.

Regarding Findings of Fact from Initial Recommended Order

As part of exception five, the District excepts to Supplemental Finding of Fact 5 on the basis that the hearing officer changed Finding of Fact 9 in the initial recommended order regarding whether the parties bargained the choice of the Marzano model in 2011.[12] The District also mentions in exception six that Supplemental Finding of Fact 12 conflicts with testimony referenced in the initial recommended order. The District further avers as part of exception fifteen that Supplemental Finding of Fact 22 conflicts with Finding of Fact 10 in the initial recommended order.[13] Thus, the District asks us to remand this case to the hearing officer again.

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[12] In the supplemental recommended order, the hearing officer indicated that Supplemental Finding of Fact 14 replaced Finding of Fact 9. It is evident that Supplemental Finding of Fact 5 – not 14 – replaced Finding of Fact 9. We correct this scrivener's error in the supplemental recommended order.

[13] For the reasons set forth in our additional discussion of exception fifteen below, Supplemental Finding of Fact 22 does not conflict with Finding of Fact 10. We also address the 2014 change referenced in Finding of Fact 10. *See infra* pages 23-24.

We decline to remand this case or reject these supplemental findings of fact on the basis proffered by the District. These findings of fact are supported by competent, substantial evidence. (Day 1 T. 20-25, 41-42, 44-46, 56, 59, 68-70, 90; Day 3 T. 341-42, 377; CP Exs. 32, 42-43, 45-46.) Moreover, in his initial recommended order, the hearing officer focused only on the issue of timeliness and did so without the benefit of a transcript. He made few findings of fact on the background of the parties' bargaining history in that recommended order, instead focusing on the events of May 2018, which he considered dispositive of the case. On remand, with the benefit of a transcript, the hearing officer reconsidered the issue of timeliness, found the charge timely, and made extensive findings of fact regarding the merits of the charge. We note that the transcript and exhibits from the three-day hearing in this case are voluminous. Accordingly, the remainder of exception five and the related portions of exceptions six and fifteen are denied.

Exceptions Six and Seven

In the remainder of exceptions six and seven, the District challenges Supplemental Finding of Fact 12, which pertains to a letter of support, and Supplemental Finding of Fact 13, which pertains to an application for "Race to the Top" funds. These findings of fact reflect the content of the cited documents, which were entered into evidence. While the District raises arguments regarding the meaning or import of the documents and the weight they should be given in considering the parties' bargaining history, this is not a basis for rejecting these findings of fact, which are supported by competent, substantial

evidence. (CP Exs. 32-33.) Accordingly, the remainder of exceptions six and seven are denied.

Exception Eight

As part of exception eight, the District takes issue with Supplemental Finding of Fact 14, in which the hearing officer found that the parties bargained over how much of the Marzano framework to implement. The District contends that the parties understood that the complete Learning Map would be used by the third year. It is evident from reading the hearing officer's findings and his reliance on them in his analysis, *see* SRO at 33, that the first two sentences of this finding are related and should be read in conjunction with each other. Contrary to the District's interpretation, the hearing officer did not find that the parties bargained in 2011 over how much of the framework to ultimately implement. Rather, he found that they bargained over how much to implement at a certain time, agreeing to implement only a few of the Marzano elements for the first year, and then bargaining over which ones to use that first year.[14]

The District also objects to the remainder of Supplemental Finding of Fact 14, contending that the parties did not negotiate over what terms such as "innovating" and "applying" meant. This is consistent with the hearing officer's finding that "the parties did

[14] The hearing officer stated that this supplemental finding of fact replaces Finding of Fact 9 in his initial recommended order, which pertained to the choice of the model. The District avers that this supplemental finding of fact does not pertain to the choice of the model, but rather what occurred after the selection of the model. As stated in footnote 12 above, we have corrected the supplemental recommended order in this regard, rendering this issue moot.

not alter the definitions in the Marzano framework" but rather "bargained over how to total the ratings to arrive at an overall conclusion."

This finding of fact is supported by competent, substantial evidence (Day 1 T. 58-59, 60-64, 86-88), and we are not at liberty to reweigh the evidence. We decline to remand this case to the hearing officer, as requested by the District, and deny the remainder of exception eight.

Exception Eleven

In exception eleven, the District takes issue with Supplemental Finding of Fact 18, in which the hearing officer found that the parties "bargained over the criteria, components, and the impacts." The District asserts that there is "no documentary evidence" demonstrating there were negotiations of the Learning Map elements, domains, protocols, criteria, or scales. This finding of fact is supported by competent, substantial evidence and reasonable inferences from the evidence, including the hearing officer's findings regarding the parties' course of conduct. (Day 1 T. 22-25, 28-29, 58-59; SFOFs 14-17.) We may not weigh the evidence differently than the hearing officer.

Next, the District summarily asserts that the hearing officer's finding that various parts of the evaluation model are intertwined is "not logical." However, this finding is also supported by competent, substantial evidence, including reasonable inferences from the evidence and the findings regarding the structure of the evaluation model. (Day 1 T. 28-29; Day 2 T. 58; Day 3 T. 332-34; SFOF 6-11, 19.) Accordingly, the remainder of exception eleven is denied.

Exception Fourteen

In exception fourteen, the District challenges Supplemental Finding of Fact 21. This finding of fact is supported by competent, substantial evidence. (Day 1 T. 42-43; CP Ex. 44.) Accordingly, exception fourteen is denied.

Exception Fifteen

As part of exception fifteen, the District challenges Supplemental Finding of Fact 22, in which the hearing officer found that the parties "continued to bargain over evaluations between 2012 and 2017" and that because they had agreed to use the Marzano Model, they "did not bargain for a few years over the model and its elements, protocols, and scales," but addressed other evaluation issues in 2012 and 2013. This finding of fact is supported by competent, substantial evidence. (Day 1 T. 41-42, 44-46, 68-70; Day 3 T. 341-42, 377; CP Exs. 42-43, 45-46.) The District asserts that changes in 2014 to the scales were not negotiated with the Union. However, this assertion is not inconsistent with this finding of fact.

Moreover, to the extent that the District contends that the hearing officer should have made additional findings regarding the 2014 change, a case will be remanded to a hearing officer for additional fact-finding only where a fact that is allegedly omitted is material to the ultimate determination and appears to have been overlooked by the hearing officer. *See Professional Association of City Employees, Inc. v. City of Jacksonville*, 31 FPER ¶ 11 (2005). The District cites Wyka's testimony that changes were made to the scales in 2014 but were not negotiated with the Union. Wyka's testimony refers to CBLT bargaining minutes from 2016, which state that the Union

complained that the change should have been bargained. (Day 2 T. 158-60; R Ex. 53.) Upon the District's request, the hearing officer took administrative notice of the Union's 2017 unfair labor practice charge filed over the change, which Doromal testified was withdrawn because it was untimely. (Day 1 T. 194-95.) The hearing officer found in his initial recommended order that the Marzano Model was updated in 2014. (FOF 10.) Thus, he cannot be said to have overlooked it. Moreover, the 2014 change is not material to the ultimate determination in this case, particularly in light of the hearing officer's findings about the other occasions on which the parties did negotiate the evaluation system or changes to it. Accordingly, the remainder of exception fifteen is denied.

Exception Seventeen

In exception seventeen, the District takes issue with Supplemental Finding of Fact 28, in which the hearing officer found that the parties had several meetings in which they "discussed" all aspects of the Marzano system, considered various models, and discussed what worked, what did not work, and what needed to be changed. This finding of fact is supported by competent, substantial evidence. (Day 1 T. 131-35.) Accordingly, exception seventeen is denied.

Exception Eighteen

In exception eighteen, the District challenges Supplemental Finding of Fact 32, in which the hearing officer stated: "The [June 2017] TA stated that the learning map was a bridge and the parties would continue to bargain over the next phase." The hearing

officer accurately set forth the language of the June 2017 TA in Supplemental Finding of Fact 31. (R Ex. 6.) Insofar as Supplemental Finding of Fact 32 purports to be a finding of fact regarding the language contained in the TA, we grant the District's exception. We note that granting this exception does not affect the outcome of this case as our discussion of the waiver issue involving this TA is based on the language set forth in Supplemental Finding of Fact 31.

Exception Nineteen

In exception nineteen, the District excepts to Supplemental Finding of Fact 34, in which the hearing officer found that the "evaluation committee met several times to bargain over the evaluation system and streamlining elements." This finding is supported by competent, substantial evidence. (Day 2 T. 47-48; Day 3 T. 368-76, 386-87.)[15] The District contends that the evaluation committee does not engage in bargaining. The hearing officer rejected the District's arguments that the District and Union were not bargaining over the evaluation system. *See* SRO at 34. The District's arguments asks us to reweigh the evidence, which we may not do. *Heifetz*, 475 So. 2d at 1281. The District further asserts that the evaluation committee did not make any offers on criteria and scales subsequent to June or July 2017. The portion of the transcript quoted by the

[15] The second sentence of this finding of fact does not mention bargaining but rather found that "[a]t one meeting of the evaluation committee, it discussed eliminating several elements and condensing elements." This finding is supported by competent, substantial evidence. (Day 3 T. 343-44, 347, 365-67, 370, 389-92; CP Ex. 2.) However, we note that to the extent that the second sentence of this finding of fact appears to place the timeline of this particular meeting after the TA, a review of the record reflects that it took place before the TA. This clarification does not affect the resolution of this case.

District is testimony explaining that the evaluation committee "never got to that" after June or July 2017 (Day 3 T. 352), which is consistent with the course of events found by the hearing officer. Accordingly, we deny this exception.[16]

Exception Twenty

In exception twenty, the District challenges Supplemental Finding of Fact 35, in which the hearing officer found that "[o]n July 12, 2017, the evaluation subcommittee held a meeting to discuss protocols, focus statements, desired effects, teacher evidence, and reduction of elements." This finding of fact is supported by competent, substantial evidence. (Day 1 T. 146-48; Day 3 T. 338-39; CP Ex. 5.) Accordingly, exception twenty is denied.

Exception Twenty-Two

In exception twenty-two, the District objects to Supplemental Finding of Fact 38, in which the hearing officer found that the CBLT met on November 17, 2017, and then recited what is stated in the minutes from that meeting. The District raises various arguments regarding the significance of this meeting and about the evaluation committee, none of which have any bearing on whether this finding is supported by competent, substantial evidence. It is. (CP Ex. 9.) Accordingly, exception twenty-two is denied.

[16] We note that even if we were to grant this exception regarding bargaining at evaluation committee meetings, it would not alter the outcome of this case. The hearing officer found that the parties had bargained over the evaluation system in CBLT meetings, resulting in, for example, the June 2017 TA. *See* SRO at 10-11 (SFOFs 30-31), 34.

Exception Twenty-Three

In exception twenty-three, the District takes issue with Supplemental Finding of Fact 39, in which the hearing officer found that the evaluation committee met on January 17, 2018, to discuss certain topics, reviewed a chart (listing the printed titles on the chart), and discussed streamlining of elements and developmental scales. The District makes much of the handwritten notes on the chart and Doromal's statement that she was "not sure what the notes are." (Day 3 T. 383.) To this end, the District requests that we remand this case to the hearing officer for clarification of his findings. However, a remand is not necessary because this finding of fact is supported by competent, substantial evidence; specifically, the meeting agenda, the printed headings on the chart, and the testimony. (CP Ex. 10; Day 3 T. 350-51, 370-72, 382-83.) Accordingly, we decline to remand to the hearing officer regarding this finding of fact and deny exception twenty-three.

Exception Twenty-Five

In exception twenty-five, the District objects to Supplemental Finding of Fact 44, in which the hearing officer found that the District's 2018 Evaluation System contained elements not in the Focused Marzano Model called "Planning for the Achievement of All Students Using Data" and "Applying Literacy and Communication Strategies." This finding of fact is supported by competent, substantial evidence. (CP Exs. 16-17; Day 1 T. 165.) The District further contends, citing Wyka's testimony, that using data for planning for student achievement was incorporated in an element of a different model – the 2017-2018 bridge – called "Tracking Student Progress." The District's arguments ask

the Commission to reweigh the evidence presented, judge credibility of witnesses, and otherwise interpret the evidence to fit its desired ultimate conclusion. This we may not do. *Heifetz*, 475 So. 2d at 1281.

The District further avers that both the elements of "Planning for the Achievement of All Students Using Data" and "Applying Literacy and Communication Strategies" are required by the FEAPs. This again asks us to weigh the evidence differently than the hearing officer. Moreover, the hearing officer found in Supplemental Finding of Fact 4 that the FEAPs do not establish exactly how a teacher must follow an accomplished practice or how a teacher must demonstrate to an administrator that a FEAP is being followed. The hearing officer also found in Supplemental Finding of Fact 4 that school districts are not required to incorporate the FEAPs verbatim in their evaluation procedures but only to embed them in the systems. Accordingly, exception twenty-five is denied.

Exception Twenty-Seven

In exception twenty-seven, the District excepts to Supplemental Finding of Fact 47, specifically the testimony of Doromal regarding the increase in teacher workload, on the basis of hearsay. In administrative proceedings, hearsay evidence is admissible for the purpose of supplementing or explaining other evidence. § 120.57(1)(c), Fla. Stat. We note that the hearing officer expressly stated in his supplemental recommended order that "[r]eferences to the record are made to facilitate review by the Commission, but are not necessarily the only record support for any finding of fact." SRO at 2 n.2. Here, the record is replete with non-hearsay evidence supporting this finding of fact, which

Doromal's testimony supplemented and explained. (Day 1 T. 266-67, 273-74; Day 2 T. 52; Day 3 T. 333-38.) This finding of fact is supported by competent, substantial evidence. (Day 1 T. 165, 169-74, 179, 266-67, 273-74, 295-98; Day 2 T. 14, 16-17, 23-24, 50-52; Day 3 T. 333-38; CP Exs. 2, 16, 17, 44, 79; R Ex. 3.) Accordingly, exception twenty-seven is denied.[17]

Exception Twenty-Eight

In exception twenty-eight, the District objects to Supplemental Finding of Fact 48 on the same basis as Supplemental Finding 47. The record is replete with non-hearsay evidence supporting this finding of fact, including the testimony of teacher Maribel Rigsby, which was cited by the hearing officer. (Day 1 T. 266-67, 273-74; Day 2 T. 50-52, 82; Day 3 T. 333-36.) This finding of fact is supported by competent, substantial evidence. (Day 1 T. 266-67, 273-74; Day 2 T. 50-52, 82; Day 3 T. 333-36; CP Ex. 16; R Ex. 31.) Accordingly, exception twenty-eight is denied.[18]

Exception Twenty-Nine

In exception twenty-nine, the District challenges Supplemental Finding of Fact 49, in which the hearing officer referenced the District's "proposal at the May 23, 2018, meeting." The District avers that it did not make a proposal on May 23, 2018, but rather informed the Union of its new Learning Map, elements, protocols, criteria, and scales. The Union states that it is inclined to agree that the District did not make a proposal,

[17] We modify this finding of fact to clarify that the District made a presentation on May 23, 2018, not a proposal. *See infra* note 20 and accompanying text.

[18] We modify this finding of fact to clarify that the District made a presentation on May 23, 2018, not a proposal. *See infra* note 20 and accompanying text.

because "[w]hat occurred on May 23, 2018, was not so much the presentation of a proposal but the presentation of a new evaluation system which the District indicated was non-negotiable." Response to Exceptions at 21.[19]

It is evident from a review of the entire supplemental recommended order that the hearing officer did not find that the District made a proposal for the purpose of bargaining on May 23, 2018. Rather, as the hearing officer found in Supplemental Finding of Fact 43, the District "was informing [the Union] of the new system." Accordingly, we grant exception twenty-nine in part only to modify Supplemental Finding of Fact 49 to clarify that the District made a "presentation" on May 23, 2018, not a "proposal."[20] With this clarification, Supplemental Finding of Fact 49 is supported by competent, substantial evidence. (Day 1 T. 165; Day 2 T. 50-52; CP Exs. 2, 16-17, 44; R Exs. 3, 31.) The remainder of exception twenty-nine is denied.[21]

Exception Thirty-One

In exception thirty-one, the District takes issue with Supplemental Finding of Fact 57, in which the hearing officer found that the District did not respond to the Union's demand to impact bargain. The District faults the Union for failing to present offers or proposals after its demand to impact bargain. The testimony the District relies on for this

[19] The Union did not paginate its response. For ease of reference, we consider the first page to be page one, the second page to be page two, and so forth.

[20] Although not the subject of an exception, we also make similar clarifications to Supplemental Findings of Fact 47 and 48.

[21] The District also summarily states that it has "previously addressed the element of Planning for the Achievement of All Students using Data" in response to Supplemental Finding of Fact 44, which was the subject of exception twenty-five. We denied that exception and likewise deny this portion of exception twenty-nine.

exception pertains to whether the Union made any offers as to the "criteria or scales" of the evaluation model, not the impacts of the District's decision. (Day 2 T. 37.) Nevertheless, the District's arguments go to whether there was ultimately a violation for failure to engage in impact bargaining – not whether this finding is supported by competent, substantial evidence and reasonable inferences from the evidence, which it is. (Day 1 T. 166, 176, 178-79.) Accordingly, exception thirty-one is denied.

Exception Thirty-Two

In exception thirty-two, the District challenges Supplemental Finding of Fact 63, contending that the fact that Rigsby attended a training does not mean that the model was actually implemented in 2018-2019 when the charge was filed. We begin by noting that the District misrepresents this finding of fact, which is that the District "was moving forward with implementing the Focused Marzano Model in 2019-2020." In this exception, the District raises various arguments about the weight that should be given to evidence regarding the implementation of a new evaluation system, including pointing to the final evaluations given to teachers for 2018-2019. The District requests us to remand the case to the hearing officer to explain why he weighed the evidence as he did. However, the hearing officer addressed the District's arguments regarding the final evaluations and implementation in his analysis and explained why he weighed the evidence as he did. *See* SRO at 29. While the District disagrees with the hearing officer's finding of fact, it is supported by competent, substantial evidence and reasonable inferences from this evidence. (Day 2 T. 59-60; CP Ex. 77.) Accordingly, exception thirty-two is denied.

Exceptions Thirty-Three and Thirty-Six through Thirty-Nine

In the remainder of exception thirty-three and in exceptions thirty-six through thirty-nine, the District takes issue with Supplemental Findings of Fact 64 and 67 through 70, raising arguments similar to those addressed as to exception thirty-two above. These findings of fact are supported by competent, substantial evidence (Day 1 T. 266-67, 273-74; Day 2 T. 52-56, 69-71; Day 3 T. 335; CP Exs. 14, 64), and we are not authorized to reweigh the evidence. The District also raises various arguments regarding the significance or legal effect of these factual findings, which are not a basis for rejecting them. The hearing officer addressed the District's arguments regarding the final evaluations and implementation in his analysis, explaining why he nevertheless concluded that the District "moved forward with implementing portions of the May 23, 2018, evaluation plan" after May 25, 2018. SRO at 29. Accordingly, exceptions thirty-six through thirty-nine and the remainder of exception thirty-three are denied.

Exception Thirty-Four

In exception thirty-four, the District excepts to Supplemental Finding of Fact 65 as hearsay. The record is replete with non-hearsay evidence supporting this finding of fact, including Rigsby's testimony. (Day 1 T. 252-57, 265-67, 273-75, 277-81, 298, 303-09, 315-16; Day 2 T. 51-52; Day 3 T. 333-38.) The District's assertion that Rigsby is not a teacher is contradicted by her testimony at the second day of hearing on October 27, 2020, that she is an elementary school teacher who taught for twelve years until December 2018, took a break, and returned to teaching in July 2020. (Day 2 T. 42-43.) The District also complains that the hearing officer cited a large range of pages and asks

that we remand the case for the hearing officer to describe in detail the specific testimony on which he relies. We decline to do so. The pertinent inquiry is whether a finding of fact is supported by competent, substantial evidence, which it is. (Day 1 T. 252-57, 265-67, 273-75, 277-81, 298, 303-09, 315-16; Day 2 T. 19-24, 33-36, 50-57; Day 3 T. 333-38.) Accordingly, exception thirty-four is denied.

Exception Thirty-Five

In exception thirty-five, the District challenges Supplemental Finding of Fact 66 on the basis of hearsay. The record contains non-hearsay evidence supporting this finding of fact, including Rigsby's testimony. This finding of fact is supported by competent, substantial evidence (Day 1 T. 266-67; Day 3 T. 335-38; CP Ex. 16),[22] and we are not at liberty to reweigh the evidence and draw different inferences from the hearing officer. *Heifetz*, 475 So. 2d at 1281. Accordingly, exception thirty-five is denied.

Exception Forty

In exception forty, the District excepts to the sentence in Supplemental Finding of Fact 71 that states, "Principal Robert Strenth sent a reminder to teachers that the data requirements were increasing, which was an element in the new system." The District contends that the email did not state that data collection was increasing. (CP Ex. 82.) Insofar as Supplemental Finding of Fact 71 purports to be a finding of fact regarding the language contained in the email, we grant the District's exception with respect to the second sentence of Supplemental Finding of Fact 71. However, granting this exception

[22] We correct a typographical error in this finding of fact: "test-dependent questions" is corrected to "text dependent questions."

does not affect the outcome of this case. We note that the first sentence of Supplemental Finding of Fact 71 is supported by competent, substantial evidence. (Day 2 T. 55-56; CP Exs. 64-65.)

Exception Forty-Two

In exception forty-two, the District takes issue with Supplemental Finding of Fact 74, contending that there was no indication that any Domain 4 evaluation was negatively affected by a teacher failing to attend data meetings. This argument misses the point intended by the hearing officer. The hearing officer found that although the data requirements have not prevented teachers from being rated as effective or highly effective on their evaluation, they must work much harder to receive those ratings. This finding of fact is supported by competent, substantial evidence. (Day 1 T. 255-58, 273, 280-81, 308-09.) Accordingly, exception forty-two is denied.

Exceptions to Supplemental Analysis and Conclusions of Law

Timeliness

As part of its exception E, the District objects to the hearing officer's conclusion that the charge was timely filed. *See* Exceptions at 62 (excepting to Supplemental Conclusion of Law 1). The District does not set forth arguments regarding timeliness in its exception, but instead states that "as previously argued, [the District] believes the Charge is untimely." We previously addressed, and rejected, the District's arguments regarding timeliness in our remand order. We agree with the hearing officer's findings and rationale in the supplemental recommended order that the charge in this case was timely filed. Accordingly, we deny this portion of exception E.

Unilateral Change

In exceptions B and E, the District challenges the hearing officer's analysis and conclusion that the District violated section 447.501(1)(a) and (c), Florida Statutes, by unilaterally imposing the 2018 Evaluation System.[23] *See* Exceptions at 42-61 (excepting to SRO at 30-45), 63 (excepting to Supplemental Conclusion of Law 3). It is well-settled that, absent certain exceptions,[24] a public employer's unilateral change of a mandatory subject of bargaining is a per se refusal to bargain, in violation of section 447.501(1)(a) and (c), Florida Statutes. *United Faculty of Florida*, 30 FPER ¶ 229. Thus, the crux of

[23] In this exception, the District reiterates many of its prior exceptions to the hearing officer's supplemental findings of fact. *See* Exceptions at 43-44, 46-48. As previously stated, those exceptions are denied.

The District additionally raises a new objection to the hearing officer's statement in his supplemental recommended order pertaining to the District's communication to its employees about having gathered input from the Union on the new evaluation model in certain meetings. *See* Exceptions at 48-49 (excepting to SRO at 33-34.) The hearing officer concluded that the meetings resulted in "TAs and agreed-upon changes that were set forth in the Instructional Evaluation Systems filed with the Florida Department of Education, as well as changes to the Instructional Personnel Evaluation Systems Procedures Manual." SRO at 33-34. The District asserts that there were no TAs or changes to the evaluation manual beginning in July 2017. This does not conflict with the hearing officer's determination that evaluation committee meetings resulted in TAs and changes to the model. The hearing officer specifically refers to the June 2017 TA as one such example. *See* SRO at 34. The District also contends that the hearing officer overlooked a statement in the communication that the District advised the Union in June 2017 that no bargaining of the evaluation tool would take place. The District further asserts that none of the changes to the elements in the June 2017 TA were the result of bargaining. *See* Exceptions at 48-49. The District's arguments ask us to reweigh the evidence, make credibility determinations, draw different inferences from the hearing officer, and resolve conflicts differently than the hearing officer – all of which we may not do. Accordingly, this portion of exception B is denied.

[24] Such exceptions are a clear and unmistakable waiver, legislative body action taken as a result of impasse, or extraordinary circumstances requiring immediate action. *United Faculty of Florida v. University of Central Florida Board of Trustees*, 30 FPER ¶ 229 (2004).

this case is whether a teacher evaluation system is a management right or a mandatory subject of bargaining.

Mandatory Subject of Bargaining Versus Management Right

This case presents an issue of first impression despite the District's purported reliance on *Gilchrist Employees/United v. School Board of Gilchrist County*, 30 FPER ¶ 71 (2004), which the District claims is the "only precedent under Florida law discussing this issue." *See* Exceptions at 49. Contrary to the District's assertion, the *Gilchrist* case does not have precedential value.[25] There, a hearing officer determined that the criteria for an "outstanding" teacher under the 2003 version of the statute was a management right. The Commission remanded the case to the hearing officer to consider whether the union had contractually waived its right to negotiate over the criteria; the Commission expressly did not decide the issue of whether the criteria constituted a mandatory subject of bargaining or a management right. The Commission ultimately never reached the issue because the union withdrew its charge after the hearing officer issued a supplemental recommended order. *See Gilchrist Employees/United v. School Board of Gilchrist County*, Case No. CA-2003-024 (PERC Apr. 27, 2004) (unpublished order). We do not find the hearing officer's recommendation in *Gilchrist* – which addressed a different statute version, a different evaluation system, and a different issue – persuasive

[25] During oral argument, the District acknowledged that this case was not binding precedent and averred that the hearing officer's recommended order in *Gilchrist* should be considered persuasive authority.

here. As the District asserts, "a sea change" in teacher evaluation occurred in 2011. *See* Exceptions at 5, 46.

In this case, we must decide whether the teacher evaluation system – including the elements, protocols, criteria, and scales – is a mandatory subject of bargaining or a management right. The Florida statutory scheme for determining the scope of bargaining does not provide a list of non-negotiable subjects. Rather, section 447.309(1), Florida Statutes, requires negotiation over wages, hours, and terms and conditions of employment. Because the statutory scheme does not identify each non-negotiable subject, this Commission is required to define those subjects on a case-by-case basis. *Amalgamated Transit Union, Local 1593 v. Hillsborough Area Regional Transit Authority*, 24 FPER ¶ 29247 (1998), *aff'd*, 742 So. 2d 380 (Fla. 1st DCA 1999).

The District contends that we need not consider this issue because section 1012.34, Florida Statutes, makes evaluation procedures the province of the superintendent, not collective bargaining.[26] However, we have closely examined the statute and nothing in it prohibits collective bargaining over teacher evaluation systems.[27]

[26] The District avers that the hearing officer appeared to make a *de facto* finding that the statute is unconstitutional. *See* Exception at 60. We disagree and do not construe the hearing officer's analysis to arrive at this conclusion. Moreover, while the Commission may not invalidate a statute on constitutional or any other grounds, the Commission "cannot shut its eyes to constitutional issues that arise in the course of administrative proceedings it conducts." *Communications Workers of America, Local 3170 v. City of Gainesville*, 697 So. 2d 167, 169-70 (Fla. 1st DCA 1997). Nevertheless, we need not discuss whether the Legislature could have exempted teacher evaluation systems from bargaining because it did not do so here and that is not the issue before us.

[27] We note that the Legislature has previously done so in at least one other statute. *See* § 1012.71, Fla. Stat. ("Funds received by a classroom teacher do not affect

Contrary to the District's argument, the statute is silent on the matter. *See* § 1012.34, Fla. Stat.[28]

We agree with the Union that the teacher evaluation system has elements representative of a mandatory subject of bargaining, pursuant to section 447.309(1), Florida Statutes, because it significantly and directly determines wages, hours, and terms and conditions of employment. We also agree with the District that the evaluation system has elements representative of a management right, pursuant to section 447.209, Florida Statutes, because it implicates a public employer's right to set standards of services to be offered to the public. Thus, to determine whether a teacher evaluation system such as the one in this case is a mandatory subject of bargaining or a managerial prerogative, we must apply the balancing test enunciated by the Florida Supreme Court. *See Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 609 So. 2d 31, 34 (Fla. 1992) (holding that when a subject has both the characteristics of being within the management prerogative and being a mandatory subject of bargaining, a balancing test must be applied).

The District argues that the evaluation system is a management right because it is the mechanism by which it sets requirements for levels of service, such as requiring teachers to engage in close reading techniques. *See* Exceptions at 44-46, 51-52. If this

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wages, hours, or terms and conditions of employment and, therefore, are not subject to collective bargaining.").

[28] The staff analysis for the 2011 bill is likewise silent. *See* Fla. S. Budget Comm., CS for CS for SB 736 (2011) Staff Analysis (Feb. 23, 2011). (R Ex. 7.)

case were simply about the District's desire to have its teachers engage in close reading techniques or assign certain tasks to its teachers, we might agree that the District could make a management decision in this regard and negotiate over any impacts that occurred. However, in this case the teacher evaluation system goes well beyond simply setting levels of service.

The hearing officer's supplemental recommended order is replete with findings demonstrating that teachers' wages, hours, and terms and conditions of employment directly flow from the evaluation system itself. For example, teachers must spend time demonstrating to administrators that they complied with the elements of the model. The addition of, or changes to, elements may require teachers to devote many more hours in lesson planning, assessments, creating student activities, and demonstrating compliance to observers. The added responsibilities in this case placed pressure on daily planning time, forcing teachers to take an increasing amount of work home.[29] Each of these elements has protocols, or criteria. The scales, which are part of the protocols, determine the score that a teacher receives, which determines the teacher's rating and is directly linked to the teacher's salary.

[29] The District raises arguments regarding the amount of workload caused by the teacher evaluation system and its disagreements with the hearing officer's findings of fact on this issue. *See* Exceptions at 53-54. We decline the District's invitation to engage in unauthorized reweighing of the evidence, judging of the credibility of witnesses, and otherwise reinterpreting the evidence to fit the District's desired ultimate conclusion. *Heifetz*, 475 So. 2d at 1281.

We agree with the hearing officer that complex teacher evaluation systems are distinguishable from those decisions that have been determined to be management rights. *See, e.g.*, *Jacksonville Consolidated Lodge 5-30, Fraternal Order of Police v. City of Jacksonville*, 44 FPER ¶ 129 (2017) (instituting body-worn cameras); *Teamsters Local Union No. 769 Affiliated with the International Brotherhood of Teamsters v. Martin County Board of County Commissioners*, 2011 WL 2275530 (2011) (furloughing employees); *Coastal Florida Police Benevolent Association v. Brevard County Sheriff's Office*, 30 FPER ¶ 297 (2004) (transferring temporarily law enforcement deputies to a detention center due to inmate suicides, overcrowding, and understaffing); *Hillsborough Area Regional Transit Authority*, 24 FPER ¶ 29247 (subcontracting); *City of Miami*, 609 So. 2d 31 (instituting drug testing of law enforcement officers allegedly seen illegally using or buying drugs); *Florida Nurses Association v. State of Florida*, 18 FPER ¶ 23265 (1992) (laying off employees); *International Association of Firefighters, Local 2416 v. City of Cocoa*, 14 FPER ¶ 19311 (1988) (setting manning level), *per curiam aff'd*, 545 So. 2d 1371 (Fla. 1st DCA 1989); *Hillsborough Classroom Teachers Association, Inc. v. School Board of Hillsborough County*, 8 FPER ¶ 13074 (1982), *aff'd*, 423 So. 2d 969 (Fla. 1st DCA 1982) (setting class sizes and minimum staffing levels).

Likewise, this case also differs from *Palm Beach County Classroom Teachers Association, Inc. v. School District of Palm Beach County, Florida*, 42 FPER ¶ 222 (2016), which is cited by the District. *See* Exceptions at 45-46. In that case, we concluded that the school district had a management right to decide how speech therapy plan of care (POC) information would be recorded by speech therapists. The hearing officer found

that the school district was not required to bargain the impact because the requirement to prepare a POC form was not a material, substantial, and significant change to the speech therapists' job duties. *School District of Palm Beach County*, 42 FPER ¶ 222.[30]

Moreover, one of the considerations in the balancing test analysis is whether the subject at issue can wait for bargaining. For example, with respect to furloughing employees, we explained such a decision "is based upon current economic conditions and should not be delayed. A delay could result in drastic consequences such as the permanent termination of employees." *Martin County Board of County Commissioners*, 2011 WL 2275530 (emphasis added). Likewise, the decision to drug test certain law enforcement officers allegedly seen using or buying illegal drugs involved urgency,

[30] The District contends that *School District of Palm Beach County* cites *Manatee Education Association v. Manatee County School Board*, 12 FPER ¶ 12017 (1988), for the proposition that the assignment of employees to perform tasks are management decisions. We note that the citation within *School District of Palm Beach County* contains a typographical error. The correct citation is *Manatee Education Association v. Manatee County School Board*, 7 FPER ¶ 12017 (1980). That case is materially distinguishable. There, we determined that the school board did not commit an unfair labor practice by revising one teacher's schedule. *Id.* We concluded that the school board's "action was not contrary to any unequivocal and consistent past practice which could reasonably have been expected to continue unchanged in the 1979-80 school year" and that the "conduct conformed with the terms of the expired collective bargaining agreement." *Id.* We also disagreed with the union's position "that a public employer is prohibited from altering an employee's work assignment without first bargaining over it" as "assignment and reassignment of employees to perform tasks that are within the scope of the basic employment duties they were hired to perform are managerial decisions." *Id.* We explained that "[m]andated bargaining over individual job assignments would also bring to the bargaining table individual disputes which should be resolved through the contractual grievance procedure" and that "adoption of the [union's] position would possibly restrict an individual employee's freedom to seek more desirable work assignments without the concurrence of the certified bargaining agent." *Id.*

integrity of the police, and public safety and protection. *See City of Miami*, 609 So. 2d at 34-35. In that case, the Florida Supreme Court reasoned:

> We find that the facts as presented in the instant case clearly affect the integrity of the police and their ability to protect the public. Since public safety and protection are the City of Miami's direct responsibility, circumstances that affect these responsibilities are management prerogatives. Public safety and protection cannot wait for a bargaining session under these circumstances.

Id. (emphasis added).

In contrast, the adoption of – or modification to – a teacher evaluation system is not an issue that cannot wait for bargaining. We note for illustration purposes that here the hearing officer found that the parties had, in fact, previously bargained over the teacher evaluation system. For example, when the new legislation passed in 2011, the parties agreed to adopt the Marzano Model and then bargained over which elements to implement in the first year. They bargained over the Instructional Personnel Evaluation System Procedures Manual for 2011-2012. The parties bargained again in 2017, when they agreed to the June 2017 TA, which contained a condensed Learning Map with a reduced number of elements. The TA was included in the 2017-2018 Instructional Personnel Evaluation System Procedures Manual, which was incorporated into the parties' 2017-2018 CBA. (R Exs. 1 at pp. 40-41, 3 at p. 29.) Moreover, teacher evaluation systems do not implicate the urgent public safety concerns noted by the Florida Supreme Court in *City of Miami*, 609 So. 2d at 34-35. The District has presented no persuasive argument as to why the adoption of a new teacher evaluation model cannot wait for bargaining.

We recognize the management right to set levels of service or to assign tasks to employees within the basic scope of employment. However, such rights cannot subsume mandatory subjects of bargaining. To hold that the teacher evaluation system in this case is a management right would essentially eviscerate the Union's ability to negotiate mandatory subjects of bargaining. For all the above reasons, under the balancing test, we conclude that teacher evaluation systems that essentially determine hours, wages, and terms and conditions of employment are a mandatory subject of bargaining.[31]

We note that the requirement to bargain with the Union prior to adopting a teacher evaluation system is the requirement to meet at reasonable times and to negotiate in good faith with the intent of reaching a common accord, but there is no requirement that either party make a concession or be compelled to agree to a proposal. § 447.203(14), (17), Fla. Stat.; § 447.309, Fla. Stat. We additionally emphasize that there is no dispute that any evaluation system adopted must conform to and comply with the applicable requirements, including those set forth in section 1012.34, Florida Statutes, and the FEAPs in Florida Administrative Code Rule 6A-5.065.

[31] The District raises numerous arguments regarding the hearing officer's citation to cases from other states (namely, Iowa, Indiana, and Michigan) and the National Labor Relations Board (NLRB). *See* Exceptions at 50 n.5, 55-59 (excepting to SRO at 40-41). We view these case citations as simply an observation that evaluations – or, as to the NLRB cases, evaluation data applicable to particular jobs or wage compensation – are mandatory subjects of bargaining elsewhere, whether by statute or under different factual circumstances. Thus, we have given these cases very little consideration and they have no bearing on our ultimate conclusion here.

Implementation

The District contends that it did not implement the 2018 Evaluation System and avers that it evaluated teachers on the old system in 2018-2019. *See* Exception at 42. The District's arguments ask us to weigh the evidence differently than the hearing officer on this issue. Here, the hearing officer found that the District unilaterally imposed the 2018 Evaluation System and had proceeded to, or moved forward with, implementing portions of the new model. *See* SRO at 29, 31, 43. He addressed in his analysis the District's arguments regarding the final teacher evaluations and implementation, acknowledging that while the evaluations did not refer to the requirements of the 2018 Evaluation System, the Union had filed a grievance and this unfair labor practice charge by that time. *See* SRO at 29. In light of the facts found by the hearing officer, we also reject the District's reliance on those cases that held that a few instances of allegedly failing to comply with a contract provision does not amount to an unfair labor practice. *See* Exceptions at 41-42.

Moreover, and significantly, while subsequent actions – such as a decision to rescind the imposition of, to not ultimately implement, or to not fully implement a new evaluation system – may affect the remedy, they cannot expunge or cure the unfair labor practice. *See International Union of Operating Engineers Locals 487, 487-A, 487-B and 487-S v. South Florida Water Management District*, 44 FPER ¶ 119 (2017). Accordingly, we deny the District's exception B and the related portion of exception E.

Waiver

In exception C, the District takes issue with the hearing officer's conclusion that the June 2017 TA did not constitute a waiver. Waiver is an affirmative defense to a unilateral change to a mandatory subject of bargaining, regardless of whether it is by express agreement, by bargaining history, or by inaction. *Professional Managers and Supervisors Association v. City of West Palm Beach*, 35 FPER ¶ 24 (2009). However, in any situation the waiver must be "clear and unmistakable." *Id.* A contractual waiver is only demonstrated by contractual language that unambiguously confers upon an employer the power to unilaterally change terms and conditions of employment. *United Faculty of Florida v. University of Central Florida Board of Trustees*, 36 FPER ¶ 60 (2010). A waiver of this type must be stated with such precision that simply by reading the pertinent provision employees will be reasonably alerted that the employer has the power to change the terms and conditions of employment. *Id.*

Here, the June 2017 TA stated as follows:

> This condensed Learning Map will be used during the 2017-2018 school year, as [the District] begins to transition to the *Marzano Focused Teacher Evaluation Model*. This streamlined, targeted resource serves as a way to bridge the 2014 Marzano Teacher Evaluation Model to the Focused Teacher Evaluation Model.

The District contends that if it did implement the Focused Marzano Model, it did exactly what the above language contemplated. *See* Exceptions at 61. However, the hearing officer found that the District imposed the 2018 Evaluation System, which is different than the Focused Marzano Model. We conclude that the June 2017 TA, which references the

Focused Marzano Model, did not waive the Union's right to bargain over the 2018 Evaluation System. Moreover, even with respect to the Focused Marzano Model, the language in the TA falls short of the clear and express language required for a waiver. Accordingly, we deny exception C.

Failure to Impact Bargain

In its exceptions A and E, the District challenges the hearing officer's analysis and conclusion of law pertaining to its alleged failure to impact bargain. *See* Exceptions at 35-42 (excepting to SRO at 23-30), 62-63 (excepting to Supplemental Conclusion of Law 2). The District is correct that impact bargaining becomes an issue only when a topic is a management right, not when it is a mandatory subject of bargaining. *See Headley v. City of Miami*, 215 So. 3d 1, 9 (Fla. 2017). Because we have determined that the teacher evaluation system is a mandatory subject of bargaining, we do not adopt the portions of the hearing officer's analysis pertaining to impact bargaining. *See* SRO at 23-30.[32] We likewise do not adopt Supplemental Conclusion of Law 2. *See* SRO at 47. Accordingly, we grant the District's exception A and the related portion of exception E insofar as we agree that impact bargaining is not at issue when a topic is a mandatory subject of bargaining, as we have concluded here.

[32] We do adopt portions of the analysis with respect to implementation, as the hearing officer's analysis of whether the evaluation system was a mandatory subject of bargaining references those prior portions of his supplemental recommended order. *See* SRO at 28-29, 31. We consider the issue of implementation only with respect to its interplay with the unilateral change portion of the charge.

Attorney's Fees

The hearing officer recommended that the Union be awarded fees for the failure to bargain portion of the charge, but not the unilateral change portion. The Union did not file an exception regarding the hearing officer's recommendation on attorney's fees and costs. We agree with the hearing officer's recommendation not to award attorney's fees and costs for the unilateral change portion of the charge as it presented a novel issue not previously addressed by the Commission. *See United Faculty of Florida v. Florida Board of Regents*, 20 FPER ¶ 25034 (1993).

In exceptions D and E, the District challenges the hearing officer's recommendation to award attorney's fees and costs to the Union for the District's failure to impact bargain. *See* Exception at 61-62 (excepting to SRO at 45-47), 63 (excepting to Supplemental Conclusion of Law 4). Because we do not reach this portion of the charge, the Union is not the prevailing party on this issue and, therefore, is not entitled to attorney's fees and costs. *See* § 447.503(6)(c), Fla. Stat. Accordingly, we do not adopt the hearing officer's analysis pertaining to attorney's fees for the failure to impact bargain portion of the charge. *See* SRO at 45-46. We likewise do not adopt Supplemental Conclusion of Law 4. *See* SRO at 47. We grant the portion of exception D pertaining to attorney's fees and the remainder of exception E.

Remedy

In exception F, the District takes issue with the remedies recommended by the hearing officer. *See* SRO at 47-48. We note that none of the remedies ordered below pertain to the demand to impact bargain portion of the charge. In support of this

exception, the District summarily avers that it challenges these paragraphs "[f]or the foregoing reasons" without further argument. *See* Exceptions at 63. Because we have denied the District's exceptions pertaining to the unilateral change portion of the charge, we also deny exception F.

Finally, as part of exception D, the District contends that it should not have to post a notice over the unilateral change portion of the charge "because the only case from the Commission," referring to *Gilchrist*, "held that setting evaluation criteria was a management right." *See* Exceptions at 62. We have rejected the District's reliance on the hearing officer's recommended order in that case, which was never adopted by the Commission. Moreover, we require the posting of notices in cases involving a novel issue, such as the one here. *See, e.g.*, *Florida Board of Regents*, 20 FPER ¶ 25034. Accordingly, we deny the remainder of exception D.

Upon review of the entire record, we conclude that, except as otherwise stated herein, the hearing officer's findings of fact are supported by competent, substantial evidence received in a proceeding that satisfied the essential requirements of law. *See Boyd*, 682 So. 2d 1117. Therefore, we adopt the hearing officer's findings of fact except as otherwise stated or modified herein. Moreover, we agree with the hearing officer's analysis of the dispositive legal issues, his conclusions of law, and his recommendations except as otherwise stated herein. Insofar as we have disagreed with some of the hearing officer's conclusions of law, we find that our resolution of those issues is as or more reasonable than that of the hearing officer. § 120.57(1)(/), Fla. Stat. Accordingly,

the hearing officer's recommended order, as modified by this order, is incorporated herein.

Pursuant to section 447.503(6), Florida Statutes, the District is ORDERED to:

1) Cease and desist from:

   (a) Refusing to bargain with the Union over the teacher evaluation system, which includes the elements, protocols, and scales;

   (b) Unilaterally imposing the May 23, 2018, evaluation system; and

   (c) In any like or related manner interfering with, restraining, or coercing bargaining unit members in the exercise of any rights guaranteed them under Chapter 447, Part II, Florida Statutes.

2) Take the following affirmative action:

   (a) Upon request, meet with the representatives of the Union for the purposes of collective bargaining concerning the teacher evaluation system and any other mandatory terms of collective bargaining;

   (b) Restore the status quo by rescinding any portions of the May 23, 2018, evaluation system that have been implemented; and

   (c) Post immediately in the manner in which the District customarily communicates with its employees, the attached Notice to Employees.[33]

[33] The District may satisfy this requirement by e-mailing the Notice to Employees to bargaining unit members or by posting the Notice to Employees on its website. *See School District of Orange County v. Orange County Classroom Teachers Association*, 146 So. 3d 1203 (Fla. 5th DCA 2014) (questioning the practicality of requiring the actual posting of notices given the advancement in modern technology).

This order may be appealed to the appropriate district court of appeal. A notice of appeal must be received by the Commission and the district court of appeal within **thirty** days from the date of this order. Except in cases of indigency, the court will require a filing fee and the Commission will require payment for preparing the record on appeal. Further explanation of the right to appeal is provided in sections 120.68 and 447.504, Florida Statutes, and the Florida Rules of Appellate Procedure.

It is so ordered.
POOLE, Chair, BAX and KISER, Commissioners, concur.

I HEREBY CERTIFY that this document was filed and a copy served on each party on September 24, 2021.

BY: _____
Clerk

/bjk

COPIES FURNISHED:

For Charging Party
Tobe M. Lev, Esquire
Eric J. Lindstrom, Esquire

For Respondent
John C. Palmerini, Esquire

NOTICE TO EMPLOYEES

Case No. CA-2018-050

POSTED PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYEES RELATIONS COMMISSION
AN AGENCY OF THE STATE OF FLORIDA

AFTER A HEARING IN WHICH ALL PARTIES HAD AN OPPORTUNITY TO PRESENT EVIDENCE, IT HAS BEEN DETERMINED THAT WE HAVE VIOLATED THE LAW AND WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE PUBLIC EMPLOYEES RELATIONS COMMISSION AND ABIDE BY THE FOLLOWING:

WE WILL NOT refuse to bargain with The Orange County Classroom Teachers Association, Inc., over the teacher evaluation system, which includes the elements, protocols, and scales;

WE WILL NOT unilaterally impose the May 23, 2018, evaluation system; and

WE WILL NOT in any like or related manner interfere with, restrain, or coerce bargaining unit members in the exercise of any rights guaranteed them under Chapter 447, Part II, Florida Statutes.

WE WILL upon request, meet with the representatives of The Orange County Classroom Teachers Association, Inc., for the purposes of collective bargaining concerning the teacher evaluation system and any other mandatory terms of collective bargaining; and

WE WILL restore the status quo by rescinding any portions of the May 23, 2018, evaluation system that have been implemented.

_____
[POSTING PARTY]

_____	_____	_____
DATE	BY	TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for **60** consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Commission.

(ULP)